IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 596

THE UNITED STATES OF AMERICA,
Plaintiff-Respondent,

vs.

FRED O. LOWE,
Defendant-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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No.....

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FRED O. LOWE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

FRED O. LOWE prays that a writ of certiorari issue to review the judgment entered October 29, 1940, in the United States Circuit Court of Appeals for the Seventh Circuit in the above entitled cause.

Questions Presented.

1. Whether the court erred in affirming the judgment of the District Court, in denying the petitioner's several motions that the indictment be dismissed, for the reason that it appears upon the face of the indictment the court had and has no jurisdiction, and the indictment fails upon

its face to state a cause of action or a crime against the laws of the United States.

2. Whether each count of the indictment is fatally defective because the schemes and artifices therein alleged are not fraudulent at common law or by statute.

3. Whether each count of the indictment even if effectively stated the devising and carrying out by defendant of a fraudulent scheme, that scheme was on which, at no time from conception through consummation contemplated or required the use of the mails.

4. Whether each count of the indictment even if effectively stated the devising and carrying out by the defendant of a fraudulent scheme that the use of the mails described in the several counts had no connection with the schemes and was not for the purpose of executing the violation of any Federal Statute, or of any other statute, and the court had and has no jurisdiction.

5. Whether the scheme or artifice to defraud should be so fully stated as to enable the court to see, as a matter of law, that, if consummated, a fraud would be perpetrated.

6. Whether it is sufficient to particularize a fraudulent scheme merely with sufficient clarity to permit defendant to meet the proof of fraud and fraudulent intent, when the scheme is not the gist of the offense, or must the scheme be so particularized so clearly and definitely that if the defendant was convicted or acquitted, that he could not again be indicted for the same offense, by pleading the record of such conviction or acquittal, so that as a matter of law by reading the scheme as particularized, it can be determined.

7. Whether a court may read facts into the case.

8. Whether counts two and three of the indictment are basically the same as the scheme in count one.

Statute Involved.

Sec. 338, Title 18 U. S. C. A.:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, postal card, package, writing circular, pamphlet, or advertisement * * * in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States * * *."

Statement of Facts.

The defendant Fred O. Lowe was indicted for violation of Section 338, Title 18 U. S. C. A. August 4, 1938 and after a trial before a jury, the jury brought in a verdict of guilty on all counts of the indictment. He was thereupon sentenced by the court to two years upon each count, running concurrently, and to pay a fine of $1500.00 on each count, payment of the fine on the first count to satisfy the fines on the remaining counts. (R. 6 and 7.) That the court erred in assessing a fine of $1500.00 contrary to Section 1000 Title 18 U. S. C.

The indictment contained three counts—

The first count states—

Defendant caused a $4,000.00 check dated May 26, 1936 to be drawn to his order against the V. M. Lowe account, then knowing "there was insufficient credit in said account * * * to meet and pay said check" and "other checks theretofore outstanding and drawn upon said account." He deposited the check "to the credit" of his Chaseburg account the same day "well knowing at said time there were insufficient funds to meet and pay" in a Prairie City Bank.

The check was, on that day, mailed to First Wisconsin National Bank of Milwaukee "for the purpose of collection in the regular course of business." (R. 1 and 2.)

The second count states—

On May 27, 1936 defendant received from Prairie City Bank two money orders, one numbered 960 for $4,000.00, dated May 26, 1936; the other, number 961 for $2,000.00 was dated May 27, 1936; they were issued "without authority and without consideration and were worthless"; the same day, he deposited the orders "to his credit" in the Chaseburg State Bank, then and there knowing that the orders were without authority or consideration, and "were worthless"; on the same day, the money orders were mailed to First Wisconsin National Bank "for the purpose of collection in the regular course of business." (R. 2 and 3.)

The third count states—

The defendant delivered four checks to Prairie City Bank on May 23, 1936. Two of them, aggregating $2600.00 were drawn against his Chaseburg account; the remaining check, aggregating $8300.00 was drawn by one V. M. Lowe against his account at the Soldiers Grove station of the Peoples State Bank of Prairie du Chien, Wisconsin, payable to Prairie City Bank. There "were insufficient funds in the accounts" against which the checks were drawn to meet and pay them, to his knowledge. He received, on the same day, from Prairie City Bank $600.00 in cash, $4000.00 to the credit of V. M. Lowe account in that bank, and four money orders in the aggregate amount of $9500.00. (R. 3 and 4.)

All three counts containing the usual statutory allegation as to devising a scheme and artifice to defraud and for the purpose of executing said scheme cause to be placed a letter sent and delivered by the Post Office Establishment.

Defendant pleaded not guilty to all counts in the in-

dictment, the case come on for trial. After the jurors were sworn, defendant moved that the indictment be dismissed, which was denied. At the close of the Government's case, the motion was again made and again denied, and at the close of the entire case, the motion was once more made and denied. (R. 8.)

Judgment of conviction was appealed to the United States Circuit Court of Appeals for the Seventh Circuit. Judgment of District Court affirmed October 29, 1940. (R. 46.) See judgment of court in record.

Ruling of the Court Below.

The United States Circuit Court of Appeals for the Seventh Circuit affirmed the District Court on October 29, 1940. (R. 46.) See judgment of court in record.

Reasons for Granting the Petition.

1. There is a diversity of opinion between the United States Circuit Court of Appeals of the 10th Circuit, the United States Circuit Court of Appeals for the 3rd Circuit, and the United States Circuit Court of Appeals for the Seventh Circuit.

(a) That the case of *Dyhre* v. *Hudspeth*, 106 Fed. (2nd) 286 (Tenth Circuit) is not distinguished from the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in this case (*The United States of America* v. *Fred O. Lowe*). The two cases are identical as to the proposition of whether mailing was independent of and after termination of the scheme.

(b) In the case of *Goodman* v. *United States*, 97 Fed. (2nd) 197 (3rd Circuit) forged checks were tendered and money and credits received. The scheme in the *Goodman* case contemplated activities on the part of defendant until the fraud was consummated. In this case as well as in the above cases, in the natural course of events, the mail would be used by the person who

extended the credit on the fraudulent checks of defendant.

(c) The scheme in the *Dyhre* case contemplated activity on the part of the defendant until the fraud was consummated. The scheme if any existed as a matter of law in the case at bar, contemplated activity on the part of the defendant and on the part of others only up to the deposit. In the *Dyhre* case a check was tendered without any bank account back of it. At bar, checks or money orders were tendered without sufficient funds or drawn without consideration or authority. In both cases the drawee was distant from the place where the goods or credit was obtained. In both cases, in the natural course of events, the mail would be used by the person who extended the credit. It is also clear that the supposed distinguishing factors as laid down in the case at bar are wholly irrelevant.

2. If the decision in the case at bar is correct, every check kiting case is a mail fraud case; a multiplicity of prosecutions under mail fraud statute will result; it is important to the administration of Justice and to the Public, and as a matter of expense to the Government, and of the jurisdiction as between false pretense prosecutions under state law as against federal prosecutions under mail fraud statutes. That it is important that this question be decided under these facts, that it is a mail fraud case.

3. Every indictment must with particularity state the offense so that defendant may prepare for his trial, and be able to plead the record of a conviction or acquittal thereunder as a defense if indicted again for the same offense, and the scheme or artifice to defraud must be so fully stated and show as a matter of law that if consummated a fraud would be perpetrated.

4. In construing the allegations of an indictment, the same must be strictly construed, and the court cannot under any circumstances read facts into the case where none exist.

5. From reading counts two and three of the indictment

it cannot be said that said counts are basically the same as that of count one in the indictment. All counts in the indictment come within the four corners of the *Dyhre* case. There is just as much reason to say, in the *Dyhre* case as at bar, that the person who tendered the document devised a scheme which, by reason of geographical distance between two points, in connection with ordinary business practices, contemplated use of the mails. If this is correct, there has been a wrong decision in either the *Dyhre case or at bar.*

6. That the court erred in assessing a fine of $1500.00 contrary to Section 1000 Title 18 U. S. C.

Conclusion.

For these reasons it is respectfully submitted that this petition should be granted.

FRED O. LOWE,
Petitioner.

F. E. WITHROW,
Attorney for Defendant-Petitioner.
P. O. Address:
310-11 Rivoli Building,
La Crosse, Wisconsin.

United States of America,
State of Wisconsin, } ss.
La Crosse County.

FRED O. LOWE being first duly sworn on oath says that he is the petitioner in the foregoing petition; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

FRED O. LOWE.

Subscribed and sworn to before me this 18th day of November, 1940.

MARIE A. WITHROW,
Notary Public,
La Crosse County,
Wisconsin.

(SEAL)

My commission expires October 10, 1942.

That hereto attached and made part hereof is defendant's brief supporting his petition herein.

IN THE

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THE UNITED STATES OF AMERICA,
Plaintiff-Respondent,

vs.

FRED O. LOWE,
Defendant-Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinion of Court Below.

The opinion of the United States Circuit Court of Appeals for the 7th Circuit is that the scheme as particularized in each of the three counts in the indictment was sufficiently described. The court was also of the opinion that the case of *Dyhre* v. *Hudspeth,* 106 Fed. (2nd) 286 (10th Circuit) had similarity of facts to the case at bar, but proceeded to distinguish the said *Dyhre* case and the case at bar and affirmed the judgment of the District Court.

Sparks and Treanor, Circuit Judges and Briggle, District Judge, presiding. Judgment rendered October 29, 1940. (R. 40.) See judgment of Court in record.

To date the judgment of said Court has not appeared in the Federal Reporter.

Jurisdiction.

The jurisdiction of this court is invoked under Section 397 Title 28 of the United States Code. The judgment of the United States Circuit Court of Appeals for the 7th Circuit in the case at bar was entered October 29, 1940. The petition for Writ of Certiorari was filed November 22, 1940.

Facts.

The facts are stated in the petition, page 3.

ARGUMENT.

1. Conflict of Decisions.

The petitioner contends that there is a diversity of opinions between the United States Circuit Court of Appeals of the 10th, 3rd and 7th Circuits, as to the proposition of whether mailing was *independent of and after the termination of the scheme.*

(a) *Dyhre* v. *Hudspeth,* 106 Fed. (2nd) 286, 10th Circuit.

Defendant had pleaded guilty to a mail fraud indictment, was committed to Leavenworth, and there brought *habeas corpus* proceedings, upon the ground that the indictment was insufficient. It appeared that the indictment alleged in eight counts, that defendant had devised a scheme to defraud certain merchants, by obtaining merchandise by means of false and fraudulent representations. He represented to the merchants he had bank accounts in certain banks, and drew checks thereon, payable to the merchants, upon the strength of which he obtained the merchandise. In fact, he had no money on deposit in the banks to meet and pay the checks, and no intention, it was alleged, that the checks be paid. For the purpose of executing the scheme, he caused the various checks to be placed in letters, which were mailed. All but one of the checks was mailed on the day it was dated.

The court said—

> "The fraud charged in each of these counts standing alone is not within the jurisdiction of the federal court, but it may be brought within that jurisdiction by charging that defendant used the United States mail 'for the purpose of executing such scheme or artifice or attempting so to do.' That was charged here, but the charge clearly shows that the United

States mail could not have been used for the purpose of executing or in attempting to execute the fraudulent scheme, because the mailing did not take place until after the defendant had induced the parties named to accept his fraudulent check for merchandise. He had thus accomplished all he set out to do in falsely representing that he had money on deposit in the banks."

(b) *Goodman* v. *United States*, 97 Fed. (2nd) 197, 3rd Circuit.

"The scheme alleged was to obtain forged checks purporting to be drawn by the National Silver Company on the Chase National Bank of the city of New York, to secure introduction to Philadelphia banking institutions and to open accounts therein, in which the forged checks would be deposited, to procure the collection of the forged checks by the banks in which they were deposited and then to withdraw the money thus obtained. It was alleged to be part of a scheme that the forged checks would be forwarded from the Philadelphia banks in which they were deposited to the Chase National Bank of the city of New York by means of the Post Office Establishment of the United States. The 'defendants well knowing the customs and usages of the local bank of deposit in forwarding said checks * * * to the foreign bank by means of the Post Office Establishment of the United States, and intending that * * * checks * * * would be transmitted through the mails aforesaid.' "

The court said—page 199—

"Nor does he seriously contend that he is relieved by the fact that the letters transmitting the checks were actually prepared and mailed by innocent parties, namely, the employees of the bank, since the defendants in depositing the checks in Philadelphia for collection in New York must be held to have caused the letters to be placed in the mails by the bank employees as their agents."

(c) *United States of America* v. *Fred O. Lowe*, defendant (case at bar), 7th Circuit.

The indictment contained three counts.

The first count states—

Defendant caused a $4000.00 check dated May 26, 1936 to be drawn to his order against the V. M. Lowe account, then knowing "there was insufficient credit in said account • • • to meet and pay said check" and "other checks theretofore outstanding and drawn upon said account." He deposited the check "to the credit" of his Chaseburg account the same day, "well knowing at said time there were insufficient funds to meet and pay" in a Prairie City Bank. The check was, on that day, mailed to First Wisconsin National Bank of Milwaukee "for the purpose of collection in the regular course of business."

The second count states—

On May 27, 1936 defendant received from Prairie City Bank two money orders, one numbered 960, for $4000.00, dated May 26, 1936, the other numbered 961 for $2000.00 was dated May 27, 1936; they were issued "without authority and without consideration and were worthless"; the same day, he deposited the orders "to his credit" in the Chaseburg State Bank, then and there knowing that the orders were without authority or consideration, and "were worthless"; on the same day, the money orders were mailed to First Wisconsin National Bank "for the purpose of collection in the regular course of business."

The third count states—

The defendant delivered four checks to Prairie City Bank on May 23, 1936. Two of them, aggregating $2600.00 were drawn against his Chaseburg account; the remaining checks aggregating $8300 were drawn by one V. M. Lowe against his account at the Soldiers Grove station of the Peoples State Bank of Prairie du Chien, Wisconsin, payable to Prairie City Bank. There "were insufficient funds in the accounts" against which the checks were drawn to

meet and pay them, to his knowledge. He received, on the same day, from Prairie City Bank $600 in cash, $4000 to the credit of V. M. Lowe account in that bank, and four money orders in the aggregate amount of $9500.

All three counts containing the usual statutory allegation as to devising a scheme and artifice to defraud and for the purpose of executing said schemes cause to be placed a letter sent and delivered by the Post Office Establishment.

The Court said in part—

> "There is considerable similarity in the facts of the Dyhre case and the instant case, but in the instant case the utilization of the two checking accounts by the defendant for the purpose of obtaining checking account credit necessarily involved the use of the mails by the depositing bank. The adoption of such scheme by the defendant supplied the factual basis for the allegation that the defendant caused the letter containing the deposited check to be placed in the mail. But under the facts of the Dyhre case there is at least considerable doubt whether it can be said that there is a factual basis for an allegation that the defendant caused a letter to be placed in the mails for the purpose of executing his fraud. Under the allegations the defendant carried no transaction with any bank, but dealt with the merchants from whom he obtained property in exchange for the worthless checks. The merchants deposited the checks and thus performed the first act which was directly related to the depositing bank's act of forwarding the check for collection. But under the facts alleged in the first count of the indictment in question the granting of the $4000. credit for the checking account of defendant was inseparably tied up with the banking practice of forwarding the deposited check for collection. Defendant was assured of the use of his checking credit at least until the depositing bank was informed by the drawee bank that the check would not be paid. Whether the defendant intended to use this period of time for the purpose of exhausting his credit in the Chaseburg Bank, and thereby, getting the full benefit of the amount of the fraudulent check, or whether he intended to use the period of time for the purpose of creating sufficient credit in the

drawee bank to take care of the amount of the check, is not material. In either case the forwarding of the check for collection was one of the means of executing his scheme to obtain checking account credit in the Chaseburg Bank. The schemes to defraud which are set out in counts two and three are basically the same as the scheme in count one."

It is to be noted that the schemes in the case at bar, as alleged, extended only up to the point and time when defendant would deposit the checks, etc., to his credit. The schemes, if any exist, were consummated, completed and entirely executed before the mailing.

In each of the above cases, goods, credits, moneys or merchandise were secured before the mailing, can it therefore be said that the distinguishing factor is that in one case it is a bank and the other an individual? Whether a check is cashed by an individual or a bank, in both events, in the ordinary course of business practices, use of the mails is contemplated.

2. Public Importance.

If the case at bar is correct, any person depositing a check, at the time of the deposit, drawn against insufficient funds, is committing a *fraud* both upon the bank receiving the deposit and the bank upon which it is drawn, and in the usual course of business, the check would be mailed and be subject to a mail fraud charge.

There must be a line of demarkation, and the question definitely established, and how far the mail fraud statute is to go, foreign to the intentions of Congress.

If the decision at bar is correct, every check kiting case is a mail fraud case, and a multitude of prosecutions will result, at a great expense to the government.

It is further important that the question be settled once and for all as to administration of justice, and of the juris-

diction as between false pretense prosecutions under state laws, as against federal prosecutions under mail fraud statutes.

3. The scheme or artifice to defraud should be so fully stated as to enable the court to see, as a matter of law, that, if consummated, a fraud would be perpetrated.

> "The object of an indictment is two fold; first, to inform the defendant of the offense with which he is charged with such particularity as will enable him to prepare for his trial; second, so to define and identify the offense that the defendant may, if convicted or acquitted, be able to defend himself in case he be indicted again for the same offense, by pleading the record of such conviction or acquittal.
>
> Under this statute the scheme or artifice to defraud, it seems to me, should be so fully stated, as to enable the court to see, as a matter of law, that, if consummated, a fraud would be perpetrated."
>
> *U. S.* v. *Loring,* (D. C. Ill.) 91 F. 881-884.

It is contended by the petitioner that it requires more than an allegation of particulars of the scheme. The allegations of the scheme must be so particularized that the face of the indictment *must* show as a matter of law, that it is fraudulent, *without reading facts* into the schemes as particularized.

The case of *Worthington* v. *United States,* 64 Fed. (2nd) 936, 938 as quoted by the Appellate Court in the case at bar, is not authority for the proposition stated therein. It is contended that it would *be good law, if the scheme would be particularized that the allegations would show as a matter of law that the scheme was fraudulent* and that the defendant upon acquittal or conviction could plead the same in defense upon another prosecution upon the same offense.

It is to be remembered that respondent has particularized, and having done so, the court will examine the schemes alleged.

It is to be remembered that in a mail fraud prosecution, the elements of the crime are—

(1) A scheme intended to defraud.

(2) An actual use of the mails in furtherance thereof.

Mazurosky v. *United States*, 100 Fed. (2nd) 958, 961.

The gist of the crime being the mailing, or the use of the mails—

> "No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by *intendment or implication*, and *the charge must be made directly and not inferentially*, or by way of recital." (Italics ours.)
>
> *United States* v. *Hess*, 124 U. S. 483, 486.

4. Courts cannot read facts into the case when none exists.

The opinion and judgment of the court below stated that the scheme alleged in Count 1, of the indictment—

> "* * * was intended to obtain a checking account credit from the Chaseburg Bank and such credit is a thing of value." (R. 42.)

That said opinion further states that

> "the facts alleged in count one do not disclose the ordinary case of a depositor-drawer who draws a check against his checking account with knowledge that his credit is not sufficient to cover the amount of the check." (R. 43.)
>
> "The scheme of the defendant, as revealed by the allegations of the indictment, was in substance a check kiting arrangement which could be successful, even temporarily, only because of the practice of the depositing bank of forwarding the check through its correspondent bank for collection from the account of the drawer in the drawee bank." (R. 44.)

That it is not alleged in the indictment, nor may it be inferred therefrom that defendant had any relations with

either of the banks in said indictment described other than that of depositor-drawer, or that the scheme therein described was in substance a check kiting arrangement.

The petitioner submits that courts cannot read facts into a case, and that the respondent having particularized, the court is strictly confined to the four corners of the indictment and any omission cannot be supplied by intendment or implication or speculative possibilities.

5. That the opinion of the court below further states that

> "* * * the schemes to defraud which are set out in counts two and three are basically the same as the scheme of count one." (R. 45.)

That is not alleged in the indictment, nor may it be inferred therefrom. That because said matters pertaining to Count I, discussed at length in said opinion, do not pertain to the allegations of Counts II and III, the case of *Dyhre* v. *Hudspeth,* 106 Fed. (2nd) 286 (10th Circuit) governs the allegations of Counts II and III.

Conclusion.

The defendant is fifty years of age, married, living happily with his family at Soldiers Grove, Wisconsin, where he has resided his entire life. He has only had the privilege of a 6th grade education in a country school. He has never been convicted of a misdemeanor or crime, and enjoys the highest respect for morality and honesty of all the people who know him.

He is the largest buyer of stock in the state of Wisconsin, has been engaged in the business for twenty-five years, his trucks pierce the very heart of the rich dairy and stock country of Iowa, Minnesota and Wisconsin. He has for a number of years paid out for stock on a Tuesday, with checks drawn on branch banks of the Prairie City Bank, located at Lynxville, Wisconsin, and Soldiers Grove, Wis-

consin, sums ranging around twenty-five thousand dollars. He has never kept books; he has used his check books for his entire transactions, seldom, if ever, getting his checks from the bank, relying entirely upon their honesty and accuracy.

Oscar Helbach, cashier of the Lynxville branch of the Prairie City Bank of Prairie du Chien, Wisconsin, admitted in open court on the trial of this case that he had appropriated to his own use, sixteen thousand dollars which belonged to the defendant, and a much larger sum, the exact amount of which defendant is unable to state, belonging to the depositors. Because of the defalcations, the stealing out of checks by said Oscar Helbach, cashier, which checks belonged to defendant, defendant was misled as to his bank account. Oscar Helbach, the cashier, further stated in his testimony that the defendant placed in the Bank at Lynxville, Wisconsin, to be deposited to his account, the sum of $4500.00; that he, Helbach, cashier, stole $2000.00 of that amount on the same day, without giving defendant any credit on the books of the bank.

Oscar Helbach, the cashier, was on the 13th day of September 1938 on his plea of guilty, sentenced by the United States District Court at Madison, Wisconsin, Judge Patrick Stone presiding, to four years at Leavenworth, Kansas, for defrauding the Prairie City Bank at Prairie du Chien, Wisconsin, out of the sum of $21,100.00.

There has been a civil action commenced and is now pending in the Circuit Court of Dane County, Wisconsin by this defendant against the Prairie City Bank, of Prairie du Chien, Wisconsin for the recovery of the sum of more than thirty-five thousand dollars, money belonging to this defendant which the said Oscar Helbach, cashier, appropriated to his own use.

Your petitioner respectfully submits that the final determination by this court of the questions involved is of ut-

most importance, not alone to the petitioner, but to the administration of justice, and to the public. The questions and reasons heretofore given should be definitely determined, and once and for all, set at rest as to whether or not the mail fraud statute is to cover a field foreign to the intentions of Congress. The decision of the United States Circuit Court of Appeals in the case at bar, is wholly in conflict with at least two other circuits, and is not alone contrary to law, but is contrary to sound principles of law. Unless the errors in the case at bar be corrected by this court, the effect will be to create regrettable confusion regarding questions as herein involved; create a multiplicity of prosecutions, expense to the government, and of the jurisdiction as between false pretense prosecutions under state law as against federal prosecutions under mail fraud statutes.

The question which this application suggests should be definitely settled by this court. Those questions are present in a large number of cases and involve great expense.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 596

FRED O. LOWE, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 40–46) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 29, 1940 (R. 46). The petition for writ of certiorari was filed November 26, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules of this Court, promulgated May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictment sufficiently alleged schemes to defraud falling within the condemnation of the Mail Fraud Statute.

2. If so, whether the uses of the mails alleged were in execution of the fraudulent schemes.

STATUTE INVOLVED

The pertinent provisions of the Mail Fraud Statute (Section 215, Criminal Code; U. S. C. Title 18, Section 338) are as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter, * * * to be sent or delivered by the post-office establishment of the United States * * * ~~any~~ * * * ~~letter~~ * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

On August 4, 1938, an indictment in three counts was returned against the petitioner in the United States District Court for the Western District of Wisconsin (R. 1–5). Each count of the indictment purported to charge petitioner with having caused the mails to be used in furtherance

of a scheme to defraud, in violation of the Mail Fraud Statute.

The petitioner was convicted upon all counts of the indictment (R. 6, 8, 16), and was sentenced to imprisonment for two years on each of the three counts, the sentences to run concurrently, and to pay a fine of $1,500 on each count, payment of the fine imposed under count 1 to be in satisfaction of the fines imposed under the remaining two counts (R. 6–7).[1] On appeal the Circuit Court of Ap-

[1] Petitioner points (Pet. 3, 7) to error committed by the District Court in imposing a fine of $1,500 under each count, the maximum fine imposable under the Mail Fraud Statute being $1,000 (*supra*, page 2). This point does not seem to have been presented either in the District Court or in the Circuit Court of Appeals. It is well settled that where a punishment imposed exceeds that permitted by the governing statute the sentence is void, at least as to the excess, and the court imposing the punishment has the power so to correct its sentence as to bring it within the maximum authorized by the statute. (*In re Bonner*, 151 U. S. 242, 258–260; *United States* v. *Pridgeon*, 153 U. S. 48, 62–63; *Williams* v. *United States*, 168 U. S. 382, 389; *De Bara* v. *United States*, 99 Fed. 942, 948 (C. C. A. 6th); *Carter* v. *Snook*, 28 F. (2d) 609 (C. C. A. 5th). See also *Husty* v. *United States*, 282 U. S. 694, 703; *Fleisher* v. *United States*, 302 U. S. 218, 219). This it may do even though the term at which the sentence was rendered has expired. (*Bryant* v. *United States*, 214 Fed. 51, 53–54 (C. C. A. 8th); *Mossew* v. *United States*, 266 Fed. 18, 22 (C. C. A. 2d); *Hammers* v. *United States*, 279 Fed. 265, 266–267 (C. C. A. 5th); *Copeland* v. *Archer*, 50 F. (2d) 836, 838 (C. C. A. 9th); *De Benque* v. *United States*, 85 F. (2d) 202, 207 (App. D. C.), certiorari denied, 298 U. S. 681.) It would seem, therefore,

peals for the Seventh Circuit unanimously affirmed the judgment of conviction (R. 40–46).

Since the evidence has not been preserved by bill of exceptions, the question of petitioner's *bona fides* (Pet. 18–19) is not involved. The sole question presented is the sufficiency of the indictment. Count one of the indictment (R. 1–2) charged in substance that the petitioner devised the following scheme and artifice to defraud: He drew a check upon a bank in which he maintained a checking account in a fictitious name, knowing that there were insufficient funds in this account to pay the check. He then deposited this check in another bank in another town, in which he maintained a checking account under his true name. The latter bank gave him credit for this deposit in his checking account, and thereupon mailed the check for collection in the regular course of business to a third bank. It was this mailing which the petitioner was charged with having caused. A more detailed analysis of this count is contained in the opinion below (R. 41–42).

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that petitioner's sentences can be corrected by the District Court on motion of the petitioner at any time. This Court also has power itself, the authorities indicate, to correct the sentences. *Blitz* v. *United States*, 153 U. S. 308, 318; *D'Allessandro* v. *United States*, 90 F. (2d) 640 (C. C. A. 3d); *Johnson* v. *United States*, 32 F. (2d) 127, 130 (C. C. A. 8th); *Spirou* v. *United States*, 24 F. (2d) 796, 797 (C. C. A. 2d), certiorari denied, 277 U. S. 596; *Haynes* v. *United States*, 101 Fed. 817, 820 (C. C. A. 8th). However, the Government has, of course, no objection to the remanding of the case to the District Court at this time for correction of the sentences.

Inasmuch as the petitioner was given a concurrent sentence on each count and the first count is clearly sufficient, there is no necessity for considering the adequacy of the remaining two counts.[2]

ARGUMENT

Petitioner contends that the first count is fatally defective in that it does not sufficiently allege a scheme to defraud falling within the condemnation of the Mail Fraud Statute.[3] His principal arguments in this respect are that it must appear from the face of the indictment that a fraud would be perpetrated if the scheme or artifice was consummated, and that the Circuit Court of Appeals read into the indictment certain facts in order to

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[2] These counts are quite similar to the first count. The scheme charged in count two (R. 2–3) was that petitioner obtained from one bank and deposited in another to the credit of his checking account certain bank money orders which petitioner obtained without paying anything therefor and which he knew were issued without consideration and without authority. The scheme charged in the third count (R. 3–5) was the deposit in one bank of worthless checks drawn on other banks and the receiving by the petitioner from the bank of deposit of credit in his checking account, cash and bank money orders. Both counts charged that he caused the use of the mails in connection with the transmission for collection in the ordinary course of business of the items deposited by him.

[3] The petition (Pet. 1, 5), the docket entries (R. 11, 15) and the opinion of the Circuit Court of Appeals (R. 40) refer to the several motions of the petitioner to dismiss the indictment. What the grounds of these motions were is not apparent from the record since the motions are not contained therein.

make out a scheme or artifice within the purview of the statute.[4]

There can be no doubt that the first count (*supra*, p. 4) sufficiently charged a scheme or artifice to defraud. As the Circuit Court of Appeals pointed out (R. 42), the presentation by the petitioner to the bank of deposit of the worthless check drawn by him under a fictitious name on another bank in which he did not have sufficient funds to pay it, constituted a false representation that the check was drawn by the person who purported to draw it and that it represented a credit of that person in the drawee bank independently of any liability thereon by the petitioner to whose order it was drawn. As a result of this device, as the court further pointed out (R. 42), the bank of deposit was induced to give the petitioner a credit in his checking account in that bank to which he obviously was not entitled. It is clear, therefore, that a fraud was perpetrated upon the bank of deposit. It matters not that the indictment did not allege that the scheme was successful or that loss occurred to the bank of deposit through the drawing of checks upon the credit, a proposition which, it was stated in the opinion of the court below, was not questioned by the petitioner (R. 42).

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[4] Petitioner also asserts, in effect (Pet. 2), without argument or citation of authorities, that a scheme or artifice to come within the ambit of the Mail Fraud Statute must be

That the Circuit Court of Appeals did not read anything into the indictment when it said that by the scheme petitioner "intended to obtain checking account credit from the Chaseburg Bank [the bank of deposit]" (R. 42) is evident from the indictment which states that "Fred O. Lowe did * * * deposit said check at the said Chaseburg State Bank to the credit of the checking account of said Fred O. Lowe" (R. 2).

2. Petitioner's principal contention with respect to the scheme alleged in the first count is that that scheme had terminated before the bank of deposit sent the check in the regular course of business by mail to another bank for collection. His position

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fraudulent at common law or must be made so by some statutory provision. There is clearly no basis for any such contention. *Durland* v. *United States*, 161 U. S. 306, 312–313.

Petitioner also asserts (Pet. 2), without argument or citation of authorities, that the scheme must be one which contemplates or requires the use of the mails and that the schemes in question were not of this character. It is settled, however, that under the Mail Fraud Statute it is not necessary to allege that the schemer intended to use the mails as part of his scheme, it being sufficient if he actually uses them or causes them to be used in furtherance of the scheme. *United States* v. *Young*, 232 U. S. 155, 161; *Silkworth* v. *United States*, 10 F. (2d) 711, 719 (C. C. A. 2d), certiorari denied, 271 U. S. 664; *Tincher* v. *United States*, 11 F. (2d) 18, 20, 21 (C. C. A. 4th), certiorari denied, 271 U. S. 664; *Wolpa* v. *United States*, 86 F. (2d) 35, 40 (C. C. A. 8th), certiorari denied, 299 U. S. 611; *Bogy* v. *United States*, 96 F. (2d) 734, 740 (C. C. A. 6th), certiorari denied, 305 U. S. 608.

is that the scheme terminated when the bank of deposit credited the check to his checking account, and that the mailing charged could not have been, therefore, in execution or furtherance of the scheme. And he cites as in conflict with the decision below the decision of the Circuit Court of Appeals for the Tenth Circuit in *Dyhre* v. *Hudspeth,* 106 F. (2d) 286.

Petitioner's contention was completely disposed of by the Circuit Court of Appeals when it said (R. 44):

> * * * the scheme of defendant, as revealed by the allegations of the indictment, was in substance a check kiting arrangement which could be successful, even temporarily, only because of the practice of the depositing bank of forwarding the check through its correspondent bank for collection from the account of the drawer in the drawee bank. The defendant included in his scheme the use of a banking practice which necessarily required the forwarding of the deposited check for collection, a practice which would enable the defendant to utilize, at least temporarily, the credit given him by the Chaseburg Bank; and the utilization of this practice was as much a part of the scheme to obtain credit as the drawing and presenting of the worthless check.

Dyhre v. *Hudspeth,* 106 F. (2d) 286 (C. C. A. 10th), *supra,* is clearly distinguishable. In that case each of the schemes charged was one to de-

fraud a merchant by obtaining merchandise in return for a worthless check drawn by the defendant on an out-of-town bank. The court held that the schemes had terminated when the defendant obtained the merchandise since "He had thus accomplished all he set out to do" and, therefore, that the subsequent forwarding of the fraudulent checks through the mails for collection could not have been for the purpose of executing the fraudulent schemes.

Here, however, the scheme charged was one to defraud a bank. The utilization by the petitioner of the two checking accounts in obtaining the checking account credit was inseparably tied up with the banking practice of forwarding the deposited check for collection and this involved the use of the mails, in the regular course of business, by the bank in which the check was deposited by the petitioner. This banking practice assured the petitioner of the use of the checking credit at least until payment of the check was refused by the drawee bank. The scheme to defraud, therefore, depended for its success upon this banking practice and consequently continued until, pursuant to such practice, the credit became no longer available to the petitioner; it did not terminate when the petitioner received the credit in his checking account for the check deposited.

In *Goodman* v. *United States,* 97 F. (2d) 197 (C. C. A. 3d), certiorari granted 305 U. S. 587,

but dismissed 305 U. S. 578, also cited by the petitioner, no question was presented as to whether the scheme had terminated at the time the mails were used.

CONCLUSION

The decision of the Circuit Court of Appeals was correct and there is involved no real conflict of decisions or any important question of federal law. The petition should, therefore, be denied unless this Court either itself decides to correct the sentences insofar as they imposed fines in excess of the maximum permitted by the Mail Fraud Statute, or desires to remand the case to the District Court for that purpose. (See footnote 1, *supra*, pp. 3–4.)

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End

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